

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

- - - - -x

In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

April 7, 2016

10:27 AM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

1

2 Motion to compel discovery in a miscellaneous matter

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20 Transcribed by: Sharona Shapiro

21 eScribers, LLC

22 700 West 192nd Street, Suite #607

23 New York, NY 10040

24 (973)406-2250

25 operations@escribers.net

1 A P P E A R A N C E S :

2 QUINN EMANUEL URQUHART & SULLIVAN LLP

3 Attorneys for Residential Capital Liquidity Trust

4 51 Madison Avenue, 22nd Floor,

5 New York, New York 10010

6

7 BY: ISAAC NESSER, ESQ.

8

9

10 PATTERSON BELKNAP WEBB & TYLER, LLP

11 Attorneys for MBIA Insurance Corp.,

12 Third Party Respondent

13 1133 Avenue of the Americas

14 New York NY 10036

15

16 BY: MICHELLE W. COHEN, ESQ.

17 STEPHANIE TEPLIN, ESQ.

18

19

20 BUCKLEYSANDLER LLP

21 Attorneys for PNC Bank, N.A.

22 100 Wilshire Boulevard, Suite 1000

23 Santa Monica, CA 90401

24

25 BY: FREDRICK S. LEVIN, ESQ.

Residential Capital, LLC, et al.

4

1 P R O C E E D I N G S

2 THE COURT: All right. Please be seated. We're here
3 in Residential Capital, 12-12020, here in connection with a
4 motion to compel compliance with subpoena issued in Minnesota.
5 The motions to compel were filed in the district court as a
6 miscellaneous matter and then referred to this Court.

7 Who's going to speak for the moving party?

8 MR. LEVIN: Good morning, Your Honor. Frederick Levin
9 for BuckleySandler -- the movants. BuckleySandler, my firm.
10 Sorry.

11 THE COURT: Let me get the other appearances as well.

12 MS. COHEN: Yes, Your Honor. Michelle Cohen from
13 Patterson Belknap Webb & Tyler, on behalf of MBIA.

14 MS. TEPLIN: Stephanie Teplin from Patterson Belknap
15 Webb & Tyler, also on behalf of MBIA.

16 MR. NESSER: Isaac Nesser, Quinn Emanuel, for the
17 Residential Capital Liquidity Trust.

18 THE COURT: Thanks very much.

19 All right. Go ahead, Mr. Levin.

20 MR. LEVIN: So, Your Honor, two matters -- two
21 discrete issues before the Court. One is the request to compel
22 production of MBIA's examiner's submission. The other related
23 to certain e-mails from three custodians that were identified
24 by MBIA.

25 THE COURT: Yeah, let me deal with that first. And I

1 don't know whether any of you were on the phone when I had the
2 telephone hearing regarding the Ally subpoena, but I raised it
3 then.

4 I don't know, Ms. Cohen, whether you or any of your
5 colleagues were on the phone.

6 MS. COHEN: I was not, Your Honor.

7 THE COURT: And the question I asked them -- let me
8 put it on the table now -- was whether -- and I guess this
9 really is addressed to MBIA. When I asked the question at the
10 last hearing, I asked it of both parties, whether they consent
11 to the transfer of the motion to compel, and here it would be
12 insofar as the e-mails are concerned, to transfer the motion to
13 the district court in Minnesota. I had expressed, in that
14 phone call concerning the Ally motion, I do intend to address
15 the issues and decide the issues myself as to whether the
16 so-called MBIA submission paper -- whether that's protected
17 from discovery. It seems to me that that's really -- the
18 examiner was appointed pursuant to my order in the ResCap
19 cases, the examiner conducted his investigation under the
20 supervision of the Court, and the protective -- at least one
21 protective order was entered by the Court. And so it does seem
22 appropriate to me that I decide that issue. But the issue
23 about the e-mails is different, and that really seems to me to
24 go really to the issues pending in the Court in Minnesota.

25 I had indicated in the phone call last week, with

1 respect to Ally -- it may have been earlier; I'm losing track
2 of time -- that I intended to talk to Judge Nelson, before whom
3 the actions are pending. I did speak with her. And she
4 supported the notion of me transferring the e-mail issue to
5 her. I told her I would keep the -- and decide the issue about
6 the submission agreement -- submission paper.

7 Rule 45(f) of the Federal Civil Procedure gives me the
8 authority to transfer it, but it does two things. One, it says
9 with the consent of the responding party, and then it says if
10 they don't consent I can still do it.

11 But so let me ask whether you would consent to
12 transferring the portion of it that deals with the e-mails to
13 the Minnesota court.

14 MS. COHEN: Of course, Your Honor. I will confess
15 this is not an issue I've discussed with my client. I was
16 unaware that that came up --

17 THE COURT: Yeah.

18 MS. COHEN: -- in that call regarding the Ally motion.
19 I will say that at this point a large portion of my client's
20 objection here has to do with the burden. We have prepared the
21 motion papers here. We prepared both for the argument before
22 Your Honor --

23 THE COURT: Would you be able to ship that all out
24 to --

25 MS. COHEN: Of course, Your Honor.

1 THE COURT: -- the Court?

2 MS. COHEN: But it would, again, require additional
3 expense on my client's part for me to prepare and to travel
4 to --

5 THE COURT: Well, that may be true --

6 MS. COHEN: -- Minnesota.

7 THE COURT: -- but I want an answer by the end of the
8 day whether your client consents. And the rule
9 actually -- this is 45(f), "When the court, where compliance is
10 required, did not issue the subpoena, it may transfer a motion
11 under this rule to the issuing court if the person subject to
12 the subpoena consents or if the court finds exceptional
13 circumstances." I won't read the rest of it. But that's -- so
14 I think I have the authority, with or without your consent.

15 Judge Nelson has -- I don't know; Mr. Nesser, how many
16 cases are out there? It was close to seventy; some of them
17 were settled.

18 MR. NESSER: I think we're in the forties.

19 THE COURT: Oh, you got into the forties? Okay. So I
20 have four other cases, the underlying mortgage purchase
21 litigation cases, and she's got forty some odd cases. And
22 consistency in rulings with respect to burden and
23 cost-shifting, I believe, is quite important and may satisfy
24 the exceptional circumstances provision of 45(f). But get back
25 to me in writing by the end of the day as to whether your

1 client consents to the transfer, because it may happen anyway.

2 MS. COHEN: We will absolutely do that, Your Honor.

3 THE COURT: Okay? All right. So what I want to deal
4 with, to hear argument about today is not the e-mail burden
5 portion of it, which what I think is not particularly important
6 but I think you probably overreached with the scope of your
7 subpoena for e-mails, but whether it's me or Judge Nelson, or
8 one of the magistrate judges in Minnesota who is handling
9 discovery would decide the issue, we'll see. But so what I
10 want to hear today is about the motion to compel production of
11 the submission paper.

12 MR. LEVIN: Yes, Your Honor. Where we left off on the
13 submission papers was the Court had recognized that the
14 difference between a confidentiality agreement and a protective
15 order, at the time it was acknowledged that there was no
16 protective order with respect to the examiner's submissions,
17 and there was no authority contradicting the otherwise
18 black-letter law that a New York confidentiality agreement
19 would not preclude discovery of another -- in an otherwise
20 proper subpoena.

21 THE COURT: May I ask you this? The subpoena sought
22 the -- well, as I understand it, the MBIA submission consisted
23 of some document that I've not seen, plus it referred to
24 attached forwarded a large volume of other documents. And am I
25 correct that the documents that accompanied the submission

1 paper have been produced?

2 MR. LEVIN: Yes, Your Honor.

3 THE COURT: Okay. So we're talking about the
4 submission paper?

5 MR. LEVIN: The submission itself, in which the MBIA
6 presumably martialed the evidence that it attached and made
7 argument, and we don't know what's in that. But the document
8 itself, and the examiner's submissions -- and I think there are
9 several -- are relevant. And the question that was posed --

10 THE COURT: I don't know whether they're relevant or
11 not. I mean, if the standard you're asking is relevance, I
12 have no idea whether they'd be admissible at trial. But that's
13 not the same issue about discovery.

14 MR. LEVIN: Well, they're relevant for purposes of
15 discovery, which was the point that the Court made on the
16 preliminary conference call, which is there is a difference
17 between discoverability and admissibility. Our assertion is
18 they're relevant for purposes of discovery and there is no
19 privilege or other protection afforded to the examiner's
20 submissions.

21 And at the end of the call, the purpose of
22 supplemental briefing was to afford the only objecting
23 party -- MBIA is not objecting on its own; the only objecting
24 party here are the plaintiffs in the underlying
25 litigation -- the opportunity to submit some authority that

1 examiner's submissions are entitled to some sort of privilege.
2 And those submissions -- that supplemental briefing occurred,
3 and no authority was submitted.

4 THE COURT: But what they rely on is the district
5 court opinion in the Ionosphere Club's case and the
6 Baldwin-United opinion.

7 MR. LEVIN: Yes, and in each of those cases there was
8 a protective order. In the In re: Ionosphere case, not only
9 was there a protective order, but one of the movants seeking
10 to, in effect, modify the protective order was reporters from
11 Dow Jones who wanted to publish, presumably report upon the
12 contents of the submissions to the examiner. Obviously that's
13 not going to happen here. There's a protective order in the
14 underlying case that would of course be honored. It would be
15 treated as confidential --

16 THE COURT: Yeah, I don't have that --

17 MR. LEVIN: -- and would not be published.

18 THE COURT: I don't have that protective order. Could
19 you submit a copy to the Court?

20 MR. LEVIN: I'm sorry; I can't hear you.

21 THE COURT: Could you submit a copy to me of --

22 MR. LEVIN: Of course.

23 THE COURT: -- the protective order that's in place in
24 the Minnesota case?

25 MR. LEVIN: Absolutely. And so there is no risk of

1 public disclosure, which was what was at issue in In re:
2 Ionosphere, and there was a court order specific to the
3 examiner that prohibited the dissemination of the examiner
4 materials. And so the issue there was the enforcement of the
5 court order which, in the preliminary conference, it was
6 admitted on the record that no protective order exists in this
7 case with respect to the examiner's submissions.

8 And likewise, in In re: Baldwin, there was a specific
9 protective order that specifically protected the examiner's
10 submissions in that case. So that case, like In re:
11 Ionosphere, which In re: Ionosphere relies on, also turns on
12 the existence of a protective order specific to the situation.
13 And that's the distinction in those cases. And so the absence
14 of that order, or any authority indicating that some other kind
15 of privilege exists, the ordinary rules of civil discovery
16 apply, and we submit that the examiner's submission should be
17 produced.

18 THE COURT: Okay. Let me hear Ms. Cohen.

19 In reading your papers, am I correct that MBIA does
20 not object to the production of the submission paper if the
21 Court overrules the plaintiff's objection?

22 MS. COHEN: That is correct, Your Honor.

23 THE COURT: All right. Mr. Nesser?

24 MR. NESSER: Good morning, Your Honor.

25 THE COURT: Good morning. Can I ask you this

1 question, Mr. Nesser?

2 MR. NESSER: Yes.

3 THE COURT: Have you -- do you have a copy -- have you
4 read the submission paper?

5 MR. NESSER: We do have a copy, and I have read it.

6 THE COURT: Okay.

7 MR. NESSER: All of the submission papers were
8 distributed as among the parties.

9 THE COURT: Well, they were distributed as among the
10 parties, and your firm represented different parties.

11 MR. NESSER: Correct.

12 THE COURT: So you didn't receive it in your capacity
13 as representing plaintiffs, and you had Allstate and some other
14 parties, as I recall.

15 MR. NESSER: No, I mean the debtor -- I believe the
16 debtor received a copy.

17 THE COURT: Well, but your firm -- and maybe you
18 weren't the lawyer doing it, but your firm represented a large
19 number of parties during the ResCap --

20 MR. NESSER: Yes.

21 THE COURT: -- bankruptcy case. And I believe -- bear
22 with me a second --

23 MR. NESSER: Allstate, Prudential --

24 THE COURT: Yeah --

25 MR. NESSER: -- AIG and the debtor. The last one is

1 the most important. MassMutual.

2 THE COURT: They were all parties to the -- I don't
3 know whether they all were, but MassMutual, Allstate and others
4 that you represented, they were parties to the confidentiality
5 agreement regarding examiner submission paper?

6 MR. NESSER: Yes.

7 THE COURT: So I assume that your firm got
8 a -- whether you did or not, your firm had a copy of the MBIA
9 submission paper?

10 MR. NESSER: I don't know the answer to that question.
11 What I know is that I've seen it --

12 THE COURT: Okay.

13 MR. NESSER: -- because the trust has a copy of it.

14 THE COURT: Okay.

15 MR. NESSER: And --

16 THE COURT: Let me ask you this. I probably should
17 have asked Ms. Cohen this, but I'll ask you. Does that
18 submission paper cover issues other than RMBS-related issues?

19 MR. NESSER: I don't recall.

20 THE COURT: Ms. Cohen, do you know?

21 MS. COHEN: I'm sorry, Your Honor. I don't know the
22 answer to that.

23 THE COURT: Okay. Go ahead, Mr. Nesser.

24 MR. NESSER: Your Honor, so I was prepared to argue
25 the motion on the terms that it had been briefed. With my hat

1 in my hand -- I don't know if the Court is aware that we filed
2 our opposition to the Ally motion yesterday morning.

3 THE COURT: I've read it.

4 MR. NESSER: And we developed an argument there that
5 had not been made here, candidly, which is that actually the
6 submission, we believe, would be covered by Your Honor's
7 protective order.

8 THE COURT: Well, I don't think so.

9 MR. NESSER: Okay.

10 THE COURT: Let me tell you why. Okay? And none of
11 you have briefed this. There were two protect -- there was the
12 uniform protective order --

13 MR. NESSER: Yes.

14 THE COURT: -- that I did approve, and had provisions
15 on preservation of attorney-client privilege and work product.
16 And it's approved by the Court. And then without the knowledge
17 or submission to the Court -- I'm not faulting anybody for
18 that -- there was the confidentiality agreement regarding
19 examiner submission paper. That's the one where I read the
20 list of your clients who were --

21 MR. NESSER: Yes.

22 THE COURT: -- your firm's clients that were
23 signatories. And they're different. They're different in a
24 number of important respects. One, there's nothing in that
25 confidentiality agreement regarding examiner submission paper

1 that, by its terms, purports to preserve attorney-client
2 privilege or work product protection.

3 MR. NESSER: That's true.

4 THE COURT: And as you've acknowledged, it was not
5 approved by the Court. An issue that nobody addressed, I don't
6 think, deals with Federal Rule of Evidence 502(d) and (e). Are
7 you aware what those rules provide, Mr. Nesser?

8 MR. NESSER: Not as I'm standing here, Your Honor.

9 THE COURT: Okay. Well, I'll tell you. 502(d) is
10 labeled "Controlling Effect of a Court Order": "A federal
11 court may order the privilege or protection that" -- "that the
12 pro" -- let me back up. Read it again. "A federal court may
13 order that the privilege or protection is not waived by
14 disclosure connected with the litigation pending before the
15 court, in which event the disclosure is also not a waiver in
16 any other federal or state proceeding." That's 502(d).

17 MR. NESSER: Yes.

18 THE COURT: And then 502(e), "Controlling Effect of a
19 Party Agreement. An agreement on the effect of disclosure in a
20 federal proceeding is binding only on the parties to the
21 agreement, unless it is incorporated in a court order." Okay.
22 And you can read the commentary.

23 MR. NESSER: Sure.

24 THE COURT: This was part of 2007 --

25 MR. NESSER: Yes.

1 THE COURT: -- amendment to the Federal Rules of
2 Evidence, and it dealt with this issue of trying to preserve
3 privilege and --

4 MR. NESSER: Um-hum.

5 THE COURT: -- and work product protection. So the
6 Uniform Protective Order has the language, it is approved by
7 the Court, and it would, in my view, arguably, protect a
8 submission. It's a different issue whether MBIA wants to
9 assert that privilege; it would be their protection to assert,
10 and they're not asserting an objection. But it would carry
11 forward.

12 But there was the second confidentiality -- paragraph
13 17 of the confidentiality agreement says, "This agreement
14 supersedes any confidentiality agreements entered into by a
15 party with any parties-in-interest in connection with the
16 submission papers."

17 MR. NESSER: Yes.

18 THE COURT: So with respect to the submission papers,
19 the confidentiality agreement says it supersedes any of that.
20 So I don't see how you can have an argument that the Uniform
21 Protective Order covers the submission agreement when there was
22 a separate agreement that specifically said it supersedes any
23 other agreement.

24 MR. NESSER: Your Honor, so if I may, the argument is
25 not one about privilege, and so I don't believe that the

1 evidentiary rules Your Honor mentioned are what we are relying
2 upon or not relying upon. The issue is one of confidentiality.
3 And the way that we read the protective order that Your Honor
4 entered governing the examiner process, that order, by its
5 terms, clearly stated that materials that are
6 proprietary -- materials that are designated as proprietary and
7 confidential may not be disclosed.

8 THE COURT: And that agreement doesn't apply to the
9 submission paper.

10 MR. NESSER: Your Honor, that order that Your Honor
11 entered doesn't say anything about submissions to the examiner,
12 because at that point there had been no -- that was the outset
13 of the examiner process.

14 THE COURT: And when the examiner requested the
15 submissions and a separate agreement was negotiated and signed
16 and not submitted to the court --

17 MR. NESSER: Yeah.

18 THE COURT: -- and at paragraph 17 said the agreement
19 supersedes any confidentiality agreements into by a party, with
20 any parties-in-interest in connection with the submissions
21 papers, you're -- look. If the parties who were going to put
22 in submission papers wanted to protect them, they could've put
23 language in there and gotten a court order to do it. But that
24 wasn't done.

25 MR. NESSER: So the argument I'm making, Your Honor,

1 is as follows. The order, the protective order that Your Honor
2 entered, is not an agreement between the parties. It was a
3 court order. And what the court order said is that
4 submission -- materials that are delivered to the examiner as
5 part of the examiner process are confidential -- if materials
6 desi -- sorry.

7 If materials that are exchanged as part of the
8 examiner process are designated as confidential, then they are
9 confidential.

10 THE COURT: And I read that agreement --

11 MR. NESSER: Yes.

12 THE COURT: -- a half a dozen times in the last few
13 days. And the other conclusion I reach is that whether it's
14 MBIA or any other party that put in a submission paper, if it's
15 their submission paper, the protective order does not
16 prevent -- and I've never seen a protective order that
17 would -- prevent the party that drafts, prepares, submits the
18 submission paper to say you can't give it to anybody else; you
19 can't produce it in discovery. And MBIA has not objected to
20 producing it.

21 MR. NESSER: Your Honor, respectfully, I think we
22 disagree with that.

23 THE COURT: Okay.

24 MR. NESSER: We have an interest as a participant in
25 the process in having the protective order that Your Honor

1 entered in the process be honored and be implemented. And
2 if --

3 THE COURT: There's nothing in that order that says
4 that MBIA can't do what it wants with -- this issue has been
5 briefed. The parties did address this issue. You made this
6 argument before. Whether -- bear with me.

7 I've certainly looked carefully at this -- whether you
8 made it or not, I certainly looked carefully at the argument.
9 And what I read the uniform protective order as saying is that
10 the disclosing party -- no one else could, under the protective
11 order -- and I'll assume for purposes of discussion, which I
12 don't think is -- and I don't think it's so, that the
13 submission was covered by the initial protective order. Okay?
14 If it was, I'm not sure what's the reason for doing a separate
15 one saying it supersedes any confidentiality agreement.

16 But assuming that the first -- the uniform protective
17 order applies, show me the language that says that a disclosing
18 party, which MBIA would be -- that a disclosing party, can't
19 produce whatever document it prepared as a disclosing party?
20 Show me the language.

21 MR. NESSER: Your Honor, I don't have the document in
22 front of me. They confiscated --

23 THE COURT: If you were going to make this argument,
24 you should have --

25 MR. NESSER: If you believe me, that the security

1 folks confiscated my computer.

2 THE COURT: Why?

3 MR. NESSER: Which is why I don't have it with me.

4 But I -- yes.

5 THE COURT: I understand there was a -- today was the
6 first day that we're having 341 meetings in the courthouse, and
7 it's Chapter 13 day. And I gather there was a very long line.
8 That's the reason everybody --

9 MR. NESSER: Yes. And I apologize for that, Your
10 Honor.

11 THE COURT: But you showed an attorney ID and they
12 confiscated your computer?

13 MR. NESSER: I had -- I didn't have a business card.
14 I had my work ID, and it was deemed insufficient. But in any
15 event, Your Honor we read the protective order as saying that
16 materials that are exchanged as part of the examiner process
17 are confidential, period.

18 THE COURT: I don't see that. I don't -- I mean, it's
19 up to the disclosing party to decide whether they want to claim
20 something -- the uniform protective order had different levels
21 of protection built in. Okay? But it all hinged on a
22 disclosing party claiming a level of protection. It's unheard
23 of -- I'm sorry, Mr. Nesser, I've never heard of anybody trying
24 to keep someone else from producing their own document because
25 you say I entered a protective order. You've got to be kidding

1 me.

2 MR. NESSER: Because it's our documents that are
3 discussed in the brief.

4 THE COURT: It's not yours.

5 MR. NESSER: It's our confidential documents that are
6 discussed in the brief. And so we have a straightforward
7 interest in having the discussion of those confidential
8 documents of ours being treated as confidential pursuant to
9 Your Honor's order.

10 THE COURT: You know, it would have been nice if you
11 had made some of these arguments to me, but you haven't.

12 MR. NESSER: I --

13 THE COURT: No, you're standing there now --

14 MR. NESSER: -- absolutely --

15 THE COURT: -- making arguments to me that are not in
16 the papers, were not raised when I had a telephone call about
17 this.

18 How many pages is the submission, Ms. Cohen?

19 MS. COHEN: I'm not sure, Your Honor. I don't know
20 how many pages it is in total.

21 MR. NESSER: Your Honor, if I recall it was in the
22 twenty- to thirty-page range. It's a brief.

23 Your Honor, may I make one point?

24 THE COURT: Go ahead.

25 MR. NESSER: Only because Your Honor has focused a

1 number of times on the provision in the protective order saying
2 it supersedes prior agreements.

3 THE COURT: In the -- in the confidentiality order.

4 MR. NESSER: In the confidentiality order, saying it
5 supersedes prior agreements. And I just want to make the
6 point, and I think it's consistent with what Your Honor's
7 suggesting, that the protective order that Your Honor entered
8 was an order that Your Honor entered by contrast to the
9 confidentiality agreement that everybody, including Your Honor,
10 has emphasized, is not an order, it's an agreement.

11 And so if the parties had been intending the
12 confidentiality agreement to supersede the order, they would
13 have had to have said we were superseding the order, and we
14 would have to had submitted it to Your Honor, so that it could
15 be entered as an order, because only Your Honor has the
16 authority to supersede the prior order.

17 And so none of that was done. And the fact that none
18 of that was done confirms, in our view, that what the
19 confidentiality agreement was meant to be was a supplement to
20 the order to clarify what perhaps had not been clear, which was
21 that when Your Honor entered a protective order months prior
22 governing an examiner process, and months later --

23 THE COURT: Point --

24 MR. NESSER: -- the examiner said --

25 THE COURT: -- point to me the -- but you can't even

1 point to me -- look, you didn't brief it. You say they
2 confiscated your computer, so you can't even point to me the
3 language in the protective order that you say applies.

4 MR. NESSER: Yes.

5 THE COURT: I'd give you my copy but I have notes on
6 it.

7 MR. NESSER: I -- Your Honor, I'm embarrassed as it's
8 possible to be, standing here. I will say that we briefed it
9 in the Ally motion which Your Honor has, which the defendants
10 have. If it would be easier to argue and decide the issue in
11 the context of --

12 THE COURT: I have the Ally briefs right here.

13 MR. NESSER: -- that motion, we're happy to do it that
14 way.

15 (Pause)

16 THE COURT: This is plaintiff's joinder in opposition
17 to movant-defendants' motion to compel compliance with subpoena
18 issued by Ally Financial, Inc.?

19 MR. NESSER: Yes, Your Honor.

20 (Pause)

21 MR. NESSER: Your Honor, counsel for MBIA has
22 graciously given me a copy of our brief, the joinder. And I
23 believe the relevant language is on page 4. I'm sorry -- I'm
24 sorry.

25 THE COURT: I think it's the first -- the paragraph

1 begins at the beginning of page 1 and carries over to page 2 at
2 the top of the page.

3 MR. NESSER: Yes.

4 (Pause)

5 THE COURT: Of course you don't address what you say
6 was used in the submission that was confiden -- that's why I'm
7 sort of left to speculate about all this.

8 MR. NESSER: Well, we --

9 THE COURT: You say you have it, but you didn't say
10 MBIA in its submission relied on numerous documents that
11 parties submitted pursuant to the protective order.

12 MR. NESSER: Well, what we do say, Your Honor, is that
13 MBIA has produced documents underlying the brief. And so those
14 had been produced; they know what they are.

15 THE COURT: MBIA produced the documents that -- and
16 you sat quietly by when that happened?

17 MR. NESSER: Either had been or will be produced.

18 THE COURT: Ms. Cohen?

19 MR. NESSER: They have been produced, Your Honor.

20 THE COURT: Okay. And those -- so the documents that
21 you're now -- you're saying those shouldn't have been produced?

22 MR. NESSER: No. The underlying documents were
23 documents that are sort of original source materials, if you
24 will. And we did not object to those being produced.

25 THE COURT: Okay.

1 MR. NESSER: What we do object to being produced --

2 THE COURT: And --

3 MR. NESSER: -- is the --

4 THE COURT: Let me ask this. Is there something other
5 than those materials that are cited in the submission?

6 MR. NESSER: I'm sure that there were. I don't
7 remember --

8 THE COURT: Do you --

9 MR. NESSER: -- standing here what they are?

10 THE COURT: Can you tell me, Ms. Cohen? I would have
11 assumed that what happened when I saw that you produced the
12 underlying papers, that whatever is referenced in the
13 submission, they produced.

14 MR. NESSER: Oh, I'm sorry. Yes. The answer is yes.
15 Anything that was cited in the papers, I understand MBIA has
16 agreed to product anything cited in the papers.

17 THE COURT: Well, they said they did produce.

18 MR. NESSER: Yes. I misunderstood the question.

19 THE COURT: So what's -- then I don't understand the
20 point. If they produced, and you had no objection to their
21 producing any of the documents that they refer to in the
22 submission, how have they -- how do you claim that producing
23 the submission violates the protective order?

24 MR. NESSER: Because, Your Honor, there's a difference
25 between producing original source materials, which are

1 documents, e-mails from ten years prior, and producing the
2 actual brief in which folks were making arguments to the
3 examiner as part of the examiner process, reflecting what was
4 happening as part of the examiner process, with respect to the
5 claims that the parties were making to the examiner. The
6 arguments that the parties were making to the examiner
7 regarding the scope of liability or not liability, that was at
8 the core of the confidential examiner process that Your Honor
9 entered the protective order to govern.

10 Your Honor, it's analo --

11 THE COURT: Why should I even listen to this argument
12 that you did not brief?

13 MR. NESSER: Your Honor, if you choose not to listen,
14 I have no --

15 THE COURT: Here's what I want. I want MBIA's counsel
16 to submit to my chambers this afternoon the submission paper
17 for in camera review; and I will look at it. And that's what
18 we're fighting about. That's what the fight's about. I want
19 to see it.

20 MR. NESSER: And Your Honor, I think --

21 THE COURT: MBIA wasn't a stranger to this. You had
22 years of -- ResCap had --

23 MR. NESSER: And that's --

24 THE COURT: -- years of litigation in the state court.

25 MR. NESSER: And that's one of the reasons why the

1 primary source documents were able to be produced, because
2 those had been produced as part of a state court action.

3 But Your Honor, I think the point that I -- part of
4 what we're concerned about here -- and Your Honor asked what is
5 our interest in this? Part of our concern here is that --

6 THE COURT: You know, when the plaintiff in the
7 lawsuit stands up in front of me and tells me that you
8 shouldn't allow production of anything that might hurt our
9 claim, that's what you're telling me. Okay? I always view
10 with a somewhat jaundiced eye when it's the plaintiff that's
11 trying to keep the defendant from discovering evidence or
12 arguments that may undercut a plaintiff's theory in the case.

13 MR. NESSER: Your Honor, this is no different than
14 when Your Honor precluded disclosure of the confidentiality
15 materials as part of the mediation.

16 THE COURT: That's because there's a recognized
17 mediation privilege. And even if the protective order applied,
18 it doesn't mean that any of the underlying documents or
19 arguments made from them will be protected from disclosure to
20 third parties.

21 MR. NESSER: So --

22 THE COURT: You don't gain protection over something
23 simply because there is a protective order in place.

24 MR. NESSER: So respectfully, we read the protective
25 order governing the examiner process, identically as the order

1 Your Honor entered governing the mediation process. In both
2 cases --

3 THE COURT: No, the difference, Mr. Nesser, is that
4 there's a recognized mediation privilege that I enforced.
5 Okay? There is no recognized privilege with respect to what
6 you're trying to block production of now.

7 If it had been labeled as work product, and if an
8 order had been entered by the Court that gave protection
9 just -- the language of the protective order, if that had been
10 included about submission agreements, we'd have a different
11 case now. Okay? But you don't.

12 All right, we're going to put this at an end. I want
13 the submission paper delivered to my chambers for in camera
14 review by the end of the day this afternoon. Do you have a
15 copy in your office?

16 MS. COHEN: I do not, Your Honor. But I will get one
17 by the end of the day for you.

18 THE COURT: Okay.

19 MR. LEVIN: Your Honor, may I be heard for just --

20 THE COURT: Go ahead.

21 MR. LEVIN: Just -- I listened intently to this entire
22 discussion on the argument that I've not heard before.

23 THE COURT: Yes, I understand.

24 MR. LEVIN: I just want to make -- be sure that there
25 is an objection on the record.

1 THE COURT: I understand.

2 MR. LEVIN: I've had no notice of any of this.

3 THE COURT: The language that's in the paper they
4 filed joining in the Ally objection was not so clear as -- and
5 I did read it. But it didn't jump out at me that what was
6 being argued -- and I don't know what's in the Ally submission,
7 I don't know what's in the MBIA submission. There was nothing
8 that suggested that this argument applied to the MBIA.

9 MR. LEVIN: I've read the Ally submission last night.
10 I didn't even see the plaintiff's submission. I read the Ally
11 one. And this is --

12 THE COURT: When you say "submission", you're talking
13 about the brief.

14 MR. LEVIN: Their brief, excuse me.

15 THE COURT: Not --

16 MR. LEVIN: Yes. Excuse me for confusing the issue.

17 THE COURT: -- submission has got a --

18 MR. LEVIN: It's getting to be a loaded word here.

19 THE COURT: Yeah.

20 MR. LEVIN: But I read the Ally brief, and this
21 argument does not appear in there. And that's another
22 interesting fact --

23 THE COURT: Yeah.

24 MR. LEVIN: -- that we've now had a lot of smart
25 people look at this and --

1 THE COURT: Right.

2 MR. LEVIN: -- this shows up at the last hour. But my
3 main point is just an objection --

4 THE COURT: I understand.

5 MR. LEVIN: The other thing I just wanted to touch on,
6 if the Court would allow me to speak to it a little bit,
7 relating to the e-mails. One of the reasons that would
8 militate in favor of the Court keeping that issue here is
9 because one of the primary objections to producing the e-mails
10 has to do with the mediation order that Your Honor entered an
11 order with respect to --

12 THE COURT: I thought that -- there is -- with respect
13 to Ally, Ally certainly argued that some of the materials that
14 you're seeking from Ally are covered by the mediation
15 privilege.

16 MR. LEVIN: That is an argument they've made here.

17 THE COURT: They haven't made that here.

18 MR. LEVIN: Oh, absolutely.

19 THE COURT: I thought this -- Ms. Cohen, I thought
20 this issue had been resolved with -- that the -- am I missing
21 something here?

22 MS. COHEN: No, that's correct, Your Honor. Our only
23 impediment to producing is the confidentiality agreement.

24 THE COURT: Good, okay.

25 MR. LEVIN: Then --

1 THE COURT: I'm sorry. I've read all these papers.
2 That argument's not made by MBIA.

3 MR. LEVIN: Well, now it --

4 THE COURT: With respect to the e-mails.

5 MR. LEVIN: No, it is made with respect to the
6 e-mails. It's not made with respect to the examiner
7 submission. That's why I think there was confusion
8 between -- in the last question and answer with my colleague.

9 MS. COHEN: Oh, I'm sorry. I thought Your Honor was
10 referring to the submission.

11 THE COURT: No.

12 MS. COHEN: We do object to the production of e-mails
13 broadly. At the last conference Your Honor had asked whether
14 we objected specifically to communications between MBIA and the
15 examiner. We have since gone back and looked at, based on the
16 custodians --

17 THE COURT: Right.

18 MS. COHEN: -- that we've received from the defendants
19 and the search terms that they've applied. In that 43,000
20 universe, there are 280 documents between MBIA and the examiner
21 or the examiner's advisors. We've not reviewed those e-mails,
22 but those e-mails we would be happy to review, create a
23 privilege log for, and produce.

24 Our overarching objection is to the 43,000 e-mails
25 that they want.

1 THE COURT: All right. Let's --

2 MR. LEVIN: But --

3 THE COURT: Stop. Stop. I've already ruled with
4 respect to mediation privilege. I don't know what -- Ms.
5 Cohen, is there some subset of e-mails that you believe are
6 protected by the mediation privilege?

7 MS. COHEN: Yes. Of the 43,000 e-mails, there are
8 approximately 12,000 that were exchanged during that period
9 that the mediation order covers.

10 THE COURT: Okay. I stand corrected, then, as to what
11 those issues are. Okay.

12 MR. LEVIN: Yes.

13 THE COURT: You're not getting e-mails that are
14 subject to the mediation privilege. And I thought you had
15 specifically disclaimed effort to get those.

16 MR. LEVIN: No.

17 THE COURT: People on your side tried to get me to
18 modify the mediation order. They lost.

19 MR. LEVIN: I fully understand that, Your Honor. The
20 issue that's going -- that may arise -- I hope it doesn't but
21 it may arise -- is, as Your Honor stated earlier, the mere fact
22 that something is submitted in connection -- a document that's
23 not otherwise protected is submitted as part of a mediation,
24 doesn't give it protection.

25 And then there -- what we're seeking is the documents

1 not excluded by the mediation order. And what they have done
2 is withheld, preliminarily, at least, any document that was
3 created after the mediation order was entered. And that's
4 roughly five gigabytes of the e-mails, according to their
5 representation to us. So we believe -- obviously we haven't
6 seen it -- but I think there's a substantial possibility that
7 questions will arise as to whether a particular withheld
8 document is or is not within the scope of the Court's mediation
9 order.

10 So the transfer of the matter to Judge Nelson creates
11 a situation where we'll go back to Minnesota, then we'll have
12 to come back to Your Honor for further clarification of the
13 mediation order. Since the issue is here --

14 THE COURT: I thought my mediation order was pretty
15 clear.

16 MS. COHEN: We agree, Your Honor. And what defendants
17 have insisted on is that we prepare a log of those 12,000
18 documents so that they can test each one, one-by-one, to
19 determine whether or not they are in fact covered by the
20 mediation order.

21 MR. LEVIN: Well --

22 THE COURT: Well, I'm not going to rest on your just
23 telling me that you think 12,000 documents are covered by the
24 mediation order. Okay?

25 I mean, I think that -- well, I'll think some more

1 about this.

2 MR. LEVIN: And just to be clear, we have not said
3 that we are insisting on a document-by-document privilege log.
4 In fact, we've encouraged MBIA to offer us any proposal in
5 between. There are all sorts of alternatives. We've suggested
6 some. Others are provided by this court's local rule. We're
7 not -- we are not insisting on the most difficult path through
8 the forest here. But their position is that they shouldn't
9 have to do anything; that essentially we should take it on
10 faith that 12,000 e-mails are all covered by the mediation
11 order.

12 MS. COHEN: With all due respect, Your Honor, our
13 argument is much more nuanced than that. To begin with, the
14 documents that they are requesting, we don't believe are
15 relevant or proportional to the needs of the case, given the
16 amount of discovery that they already have access to.

17 THE COURT: Okay, stop. Proportionality is going to
18 be decided by Judge Nelson. Okay? I'm not going to stick my
19 nose under the tent of the cases pending before her. If there
20 are -- so you can try that out on her, and maybe they've been
21 overbroad in what they've asked for, and maybe she'll cut it
22 back. And if -- with respect to the issue -- I thought my
23 opinion and order on mediation was pretty clear. That doesn't
24 mean that you get free rein to just say mediation, and
25 therefore everything is protected. It's not "trust me".

1 So you think 12,000 e-mails or 12,000 pages are
2 subject to mediation privilege?

3 MS. COHEN: It's 12,000 e-mails, Your Honor.

4 THE COURT: Out of -- what's the universe of them?

5 MS. COHEN: 43,000.

6 THE COURT: 43,000. And that conclusion is based on
7 they're in the date range when the mediation was taking place?

8 MS. COHEN: They are in that date range. And we're
9 only talking about three custodians here, Your Honor, who were
10 involved intimately in the litigation and the mediation as
11 well, from the business side.

12 In addition, within those 12,000 there are
13 approximately, I believe the number is, 5,500 which include
14 either inside counsel or outside counsel for MBIA as well.

15 THE COURT: I'm sorry, how many?

16 MS. COHEN: Approximately 5,500. So in addition to
17 being covered by the mediation privilege, they would also
18 be -- or we suspect they will be protected by attorney-client
19 privilege or work product.

20 THE COURT: Well, as to privilege, attorney-client
21 privilege, I think the court in Minnesota should decide that.
22 As to mediation, I'm less clear. Let me put it that way. I'm
23 not -- I expect to have an answer from you today on
24 referring -- transferring the motion to Minnesota, other than
25 for the submission paper. And I'll also think some more about

1 the extent that MBIA contends that e-mails are covered by the
2 mediation privilege.

3 MS. COHEN: I'm sorry, Your Honor. I didn't
4 understand that last portion.

5 THE COURT: I will think some more about keeping the
6 portion of the motion that relates to e-mails which you contend
7 are covered by mediation privilege, since I've already decided
8 the mediation privilege issue once.

9 The two of you need to confer further on the issue of
10 a privilege log and the extent to which it needs to identify
11 groups of documents or specific documents. If I keep the
12 mediation privilege issue, I will seriously consider allocating
13 costs, if you insist on a privilege log of all 12,000 of those
14 documents. I want to make it clear; I have the authority to do
15 it. MBIA is a third party. And I will seriously consider not
16 imposing the entire cost, but when the exercise is done, cost-
17 shifting to some degree.

18 MR. NESSER: Yes, Your Honor.

19 THE COURT: I intend, after I find out what MBIA's
20 position is on transfer, which I still have the authority to
21 do, even if they object, I will have another conversation with
22 Judge Nelson as well and talk further with her about it. Okay.
23 We're adjourned.

24 IN UNISON: Thank you, Your Honor.

25 MR. NESSER: Your Honor? At the risk of

1 getting -- given the confusion, could we put in a two-paragraph
2 letter just explaining our view on the --

3 THE COURT: Could you go up to the microphone? I'm
4 having difficulty hearing you.

5 MR. NESSER: Just given the confusion, Your Honor,
6 would it be permissible for us to submit two paragraphs, just
7 explaining our view on the protective order today?

8 THE COURT: No.

9 MR. NESSER: Okay.

10 THE COURT: No. Briefing is done.

11 MR. NESSER: Thank you.

12 THE COURT: All right, we're adjourned.

13 MR. LEVIN: Thank you, Your Honor.

14 (Whereupon these proceedings were concluded at 11:18 AM)

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

RULINGS

	PAGE	LINE
MBIA's submission paper is to be	28	12
delivered to chambers by the end of the day		
for in camera review		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript is a true and accurate record of the proceedings.

Sharona Shapiro

SHARONA SHAPIRO

AAERT Certified Electronic Transcriber CET**D 492

eScribers

700 West 192nd Street, Suite #607

New York, NY 10040

Date: April 8, 2016